

### World Courts as Guardians of Peace?

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**Christian J. Tams**

# **World Courts as Guardians of Peace?**

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*Christian J. Tams*

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## Abstract

Over the past few decades, international courts and tribunals have once more risen to prominence: their number has grown and their case-load increased significantly, to the point where we are said to live in an 'era of adjudication'. At the same time, the functions and mandates of courts have changed. Whilst 19th and early 20th century thinkers thought of them as guardians of world peace, contemporary designs of world order seek to ensure peace through varied forms of international organisation. International courts play important roles, but are no longer expected to prevent war and military conflict. In charting this evolution, this Research Paper offers a panorama on two centuries of debate on international arbitration and adjudication.

## Keywords

*International courts - international law - collective security - legalisation of international relations - dispute settlement - arbitration*

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# World Courts as Guardians of Peace? \*

Christian J. Tams

## I. Introduction

'If all disputes could be resolved in the hushed calm of courtrooms rather than the swirling world of political cut-and-thrust, then civilization could be said to have taken a giant and noble forward stride' (Neff 2014: 346) – Stephen Neff's statement gives eloquent expression to a recurring theme of internationalist thought: the hope that in a just and civilized world order, conflicts will be resolved not only on the basis of law, but also before institutions tasked to apply rules of law, viz. impartial and independent international courts and tribunals. It juxtaposes the dangerous world of power politics ('swirling', and dominated by the 'cut-and-thrust') to the rational and civilized atmosphere (the 'hushed calm') of the courtroom. It evokes an image of wise arbiters of peace addressing the great challenges of mankind on the basis of international law and justice.

In line with this powerful image, international courts have long been viewed as instruments of war-prevention. In that light 'going to court' is seen as an alternative – and no doubt a preferable one – to 'going to war'. In fact, arbitration and adjudication (or at least some rudimentary form of decision-making by an independent body) as a means of 'taming' inter-state relations were there from the beginning of the modern debates about international peace and security. Dispute settlement by an impartial body of sovereigns was a crucial means of containing conflict and avoiding war in the peace projects of William Penn (1693: Ch. I) and the Abbé de Saint-Pierre (1713). In his *Plan for a Universal and Perpetual Peace*, Jeremy Bentham (1843: 552) justified his proposal for a Common Court of Judicature in the following terms: 'Establish a common tribunal, the necessity of war no longer follows from difference of opinion. Just or unjust, the decision of the arbiters will save the credit, the honour, of the contending party.' And around 150 years later, when an international court had become a reality, a delegate at the San Francisco Conference establishing the United Nations praised the establishment of the

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This paper draws on, and adapts, material used for the author's earlier study on the role of world courts in Catholic peace ethics: see C.J. Tams, 'World Peace through International Adjudication?' in H.G. Justenhoven and M.E. O'Connell (eds.), *Peace Through Law: Can Humanity Overcome War?* (Nomos/Hart 2016)..

International Court of Justice (ICJ) as a way of 'substituting orderly processes for the vicissitudes of war and the reign of brutal force' (UNCIO 1945: 393).

A further seventy years on, the landscape of international adjudication has changed beyond recognition. International courts and tribunals – non-existent at the times of Penn, Saint-Pierre and Bentham; a rarity in 1945 – have mushroomed. A recent account puts the number of operative permanent international courts at 'at least two dozen', and the number of binding judicial decisions rendered between 1990 and 2011 at a staggering 34,000 (Alter 2014a: 53, 65 and 68).<sup>1</sup> International lawyers have begun to speak of the present era as an 'age of adjudication', noting that recourse to courts and tribunals has become more common than ever before in the history of international relations.<sup>2</sup> And not just the numbers have changed. The change is qualitative as much as it is quantitative; it affects the functions of international adjudication as well. Courts today are not just dispute settlers, they are also law-makers, fact-finders, and instruments of governance.<sup>3</sup> But do they play a significant role in preserving world peace? Does Bentham's straightforward argument – '[e]stablish a common tribunal, the necessity of war no longer follows from difference of opinion' (Bentham 1843: 552) – still have any purchase? Perhaps less than the term 'age of adjudication' might suggest.

\*\*\*

These cursory remarks point to important changes in the role of international courts in international relations, and in our expectations of their influence on international affairs. The subsequent considerations explore these changes by tracing the history of international arbitration and adjudication over the past two centuries.<sup>4</sup> To trace developments, the discussion follows a chronological approach,

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<sup>1</sup> The numbers do not include non-permanent bodies engaged in dispute settlement, such as investment tribunals.

<sup>2</sup> The title of a lecture by Judge Christopher Greenwood, at [http://legal.un.org/avl/ls/Greenwood\\_CT.html](http://legal.un.org/avl/ls/Greenwood_CT.html).

<sup>3</sup> The debate about the functions of international courts is still at an early stage. The terminology used in the text follows Alvarez 2014: 159. For influential accounts (often using other terminology) see e.g. Alter 2014a: 63; and Kingsbury, in Crawford and Koskeniemi 2012: 203.

<sup>4</sup> The subsequent discussion does not systematically distinguish between the two main modes of binding dispute resolution, viz. *adjudication* before standing courts and *arbitration* (where the parties enjoy greater influence over the dispute settlement process, including by choosing the arbitrators). As is clear from section II.1., historically, arbitration precedes adjudication; and for a while (as noted in III.1.), the establishment of a standing international court was an important demand. However, since 1945, there has been a rapprochement; and from the perspective of dispute settlers, arbitral and adjudicative bodies are essentially characterized by their power to render binding decisions. For more on this see Brownlie 2009: 267, 273–7. For more on the early history of arbitration see Ralston 1929; Fraser 1926: 179; Lingens 1988. Instructive summaries can be found in O'Connell and VanderZee 2014: 42; Roelofsen 2014: 145.

within which a number of broad general developments concerning international courts are considered. For reasons of convenience, the narrative distinguishes four stages in the on-going debate about the role of world courts: the *gradual re-emergence* of arbitration as a common method of dispute settlement from the end of the 18th century (section II.); the consolidation of this practice, coupled with efforts to make it compulsory, from the late 19th century onwards in what might be described as an *idealistic turn* in dispute resolution (section III.); the *pragmatic turn* from the inter-War period, which envisioned a much more circumscribed role for international courts and which continues to dominate debates (section IV.); and the more recent *revitalization*, characterized by the establishment of dozens of new courts and tribunals, but firmly wedded to the pragmatist understanding of their role (section V.). Needless to say, the distinction between four stages of development does not do justice to the continuous evolution of ideas: debates about world courts have been far too diverse to be neatly categorized into four 'eras', and the treatment in the following is impressionistic rather than comprehensive. Yet it is hoped that by following a simplified structure, the subsequent discussion will succeed in accentuating important developments in the international community's perception of courts and tribunals as instruments of world peace.

## II. New Beginnings: the Gradual Re-emergence of International Arbitration

Where there is law, there are disputes. International law forms no exception: much of it has been forged in disputes about legal rights and duties. Yet international law is special in that, compared to other legal systems, courts and tribunals have historically played a relatively limited role in the process of settling international legal disputes. To be sure, from ancient times the actors of international law have occasionally relied on impartial third parties for the settlement of their disputes; arbitration did indeed take place (in the words of an influential treatise published in the 1920s) 'from Athens to Locarno' (and has, since then, continued; Ralston 1929).<sup>5</sup> But submission to binding dispute settlement was always based on the consent of the parties; at no point in time were states legally required to accept adjudication or arbitration as a regular means of dispute settlement. What is more, during the formative age of contemporary international law – the 17th and 18th centuries – binding dispute resolution was very much in decline.<sup>6</sup> A system emphasizing external sovereignty approached the notion of an impartial authority sitting in judgment over independent states with some caution.

<sup>5</sup> See also O'Connell and VanderZee 2014: 42: 'Formal processes of inter-group dispute resolution long pre-date the rise of modern international law in 1648'.

<sup>6</sup> Fraser (1926: 196) speaks of an 'eclipse', Grewe (2000: 363) of a 'nadir of international arbitration', but that may be an exaggeration: contrast the accounts of Roelofsen 2014: 155–9, and (in greater detail) Lingens 1988. In Roelofsen's (159) words: 'In the 18th century, the idea of arbitration enjoyed a certain popularity but its actual practice was in decline. Even though there was no total eclipse of arbitration in diplomatic practice, the number of actual cases of arbitration from the 1730s on recorded in treaty practice is small'.



The cautious approach was overcome in the course of the late 18th and 19th centuries during which international arbitration re-emerged as a useful means of dispute resolution.<sup>7</sup>

### *Arbitration as a useful form of dispute settlement*

While drawing on ancient practices, '[p]our voir surgir de manière définitive et précise les moyens de [règlement pacifique des différends] interétatiques tels qu'on les connaît aujourd'hui, il a fallu attendre l'émergence et la consolidation de l'Etat moderne et d'une société interétatique.' (Caflisch 2001: 306). The Jay Treaty of 1794<sup>8</sup> is widely credited<sup>9</sup> with having ushered in the new era: concluded between two recent belligerents, Great Britain and the United States of America, it envisaged different arbitral mechanisms to address boundary disputes, claims by British merchants against U.S. nationals, and claims by U.S. citizens against Great Britain. These mechanisms and their frequent use<sup>10</sup> did much to help regularize the practice of arbitration, which in the course of the 19th century came to be seen as a useful, practical way of settling disputes – and acceptable even to states protesting their sovereignty, as it was not imposed, but remained based on their consent. In retrospect, the breadth of disputes considered arbitrable is quite remarkable: large numbers of inter-state treaties provided for arbitration over boundary disputes, many others set up institutions to deal with pecuniary claims (whether inter-state or claims by private citizens).

### *Regularization and adaptation*

For all that, arbitration remained an unusual form of dispute resolution. Stuyt's prominent survey (1990) lists circa 180 awards rendered in the century following the Jay Treaty, i.e. less than two per year. But it clearly became less uncommon; especially if the more numerous (yet typically smaller) claims addressed by claims commissions are taken into account (see Dolzer 2011: para. 6–7). And over time,

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<sup>7</sup> The process has been described in detail elsewhere. For reliable accounts see e.g. Simpson and Fox 1959: ch. 1; Caflisch 2001: 245.

<sup>8</sup> Reproduced in Hunter Miller 1931 and in Tams and Tzanakopoulos 2012: 3.

<sup>9</sup> Ralston (1929: 191) is emphatic: 'the modern era of arbitral or judicial settlement of international disputes, by common accord among all writers upon the subject, dates from the signing on 19 November 1794 of Jay's Treaty between Great Britain and the United States'. But this claim – just like Fraser's point about the 'eclipse' of arbitration in the early modern era (1926) – is in fact quite controversial: deviating from the alleged 'common accord', Lings (1988: 153) and Roelofsen (2014: 160) emphasize commonalities between the Jay Treaty arbitration and earlier 18th century precedents. That said, the Jay Treaty was special because it marked the conscious use of arbitration to address claims (including those by private individuals) relating to a prior major conflict, and because it resulted in a large number of decisions.

<sup>10</sup> A point stressed by O'Connell and VanderZee (2014: 44), who note that '[b]etween 1794 and 1804, 536 arbitral awards were made under the Jay Treaty, beginning with the St. Croix River Arbitration of 1798, which delineated much of the Canada–United States boundary'.

the process of binding dispute settlement matured and evolved.<sup>11</sup> Sovereign arbitration by heads of states or dignitaries – Kings, Queens, Tsars, Emperors, and on occasion even the Senate of Hamburg<sup>12</sup> – was gradually replaced by professionalized forms of arbitration, with lawyers taking (and not just preparing) decisions. Unreasoned decisions gave way to reasoned awards. Parties and arbitrators took greater pains to clarify the basis of decisions; decisions came to be rendered on the basis of some pre-identified body of law (as opposed to equity), and in turn contributed to the thickening of rules governing international claims. And finally, best practices of arbitral procedure (how to select arbitrators; how to deal with evidence, etc.) began to crystallize.

The experience with the *Alabama claims* of 1872,<sup>13</sup> another landmark, suggested that, in fact, sovereign states (including the powerful ones) would accept the authority of international law even where this came at a considerable price: grudgingly, no doubt, but relatively swiftly, the United Kingdom paid \$ 15.5 million to the United States, to compensate for damages caused by Confederate ships which the United Kingdom had failed to prevent. This sent a powerful signal, and one not lost on states: henceforth, there were calls to rely on arbitration not only as a form of ‘emergency treatment’, resorted to once a dispute had arisen, but prospectively, by formulating arbitration treaties that would allow resort to arbitration in future disputes (Caflisch 2001: 307).<sup>14</sup> Arbitration had come of age.<sup>15</sup>

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<sup>11</sup> The point is overlooked in quite a number of general accounts. See Simpson and Fox (1959: 1–12) for a clear summary.

<sup>12</sup> See e.g. the two British-Portuguese disputes (1855, 1861) about indemnities and denial of justice, referred to in Stuyt 1990.

<sup>13</sup> For the relevant documents see Parry 1969: 145; Tams and Tzanakopoulos 2012: 5; and Lapradelle and Politis 1923: 889. In the words of two commentators, ‘[t]his award—and, indeed, the arbitral process itself—energized the peace movement and motivated states to engage in arbitration to settle more disputes. The single most important fact about the Alabama Claims was the example of a great power voluntarily entering into arbitration with a weaker state over an important issue and abiding by the result’ (O’Connell and VanderZee 2014: 45). See further Caron 2000: 4, 8–9; and, for many details, Bingham 2005: 1.

<sup>14</sup> See further below, III.1.

<sup>15</sup> A (fictitious) scene from August Strindberg’s *The German Lieutenant* (which David Caron refers (2000: 9) to in his account) illustrates the importance attached to the *Alabama* arbitration at the time. It involves the German Lieutenant von Bleichroden and his wife discussing politics with other guests in a hotel in Vevey on the Lake Geneva. While they converse, ‘the dark, steel-blue evening sky was cut through by a streak of light, and above the low-lying Savoy shore there rose a rocket of enormous size ... before it exploded with a report which took two minutes to reach Vevey. Then there spread out something like a white cloud which assumed a four-cornered rectangular shape, a flag of white fire; a moment after there was another report, and on the white flag appeared a red cross. All the party sprang up and hastened into the veranda. “What does that mean?” exclaimed Herr von Bleichroden, startled. No one could or would answer, for now there rose a whole volley of rockets as if discharged from a crater over the peaks of the Voirons, and scattered a shower of fire which was reflected in the gigantic mirror of the lake. “Ladies and gentlemen!” said the Englishman, raising his voice, while a waiter placed a tray with filled champagne glasses on the table. “Ladies and gentlemen!”, he repeated, “this means, according to the telegram which I have just received, that the first International Tribunal at Geneva has finished its work; this means that a war between two nations, or what would have been worse—a war against the future, has been prevented ... The Alabama Question has been settled not to the advantage of America, but of

### III. Building the 'Invisible Palace of Law and Justice'<sup>16</sup>: the Idealist Turn in Dispute Settlement

Since its re-emergence during the 19th century, binding dispute settlement has remained part of international relations. However, its relevance has varied over time. The subsequent sections highlight the main 'ups' and 'downs', and they begin on a wildly optimistic note: towards the end of the 19th century, the ideas of arbitration and adjudication gained huge momentum. To a powerful 'legalist movement',<sup>17</sup> courts and tribunals were the obvious instruments of world peace, and arbitration and adjudication natural ways of resolving international conflicts in a civilized world society, which – having opted for binding dispute resolution – would no longer need to espouse war.

#### *The legalist movement*

Developments during the two to three decades preceding World War 1 are little short of remarkable.<sup>18</sup> They witnessed unprecedented popular debates about – perhaps even obsession with – dispute settlement, arbitration and adjudication. Prior to the emergence of general world organizations, courts and tribunals were seen as central elements of a better world order. This was an 'idealist turn' of significance. Until the outbreak of World War 1, idealist sentiment dominated the day and led to significant advances in the cause of peaceful dispute resolution. And four years after the end of the war, the international community would eventually set up its first 'world court', the Permanent Court of International Justice, in The Hague. Yet by then, faith in international courts and tribunals as guardians of world peace had been shaken, many progressive internationalists began to embrace other projects, and the legalist movement for international arbitration and adjudication had begun to lose steam.

Yet what power the legalist movement possessed at the turn of the last century! In retrospect, one cannot but be amazed at the huge appeal of the concepts, which,

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justice, not to the injury of England, but for the good of future generations. Does our Spanish friend still believe that wars are unavoidable? When our French friend smiles again, let him smile with the heart and not with the lips only. To-day, as an Englishman, I ought to feel depressed, but I feel proud on account of my country, as an Englishman always does, you know; but to-day I have a right to be so, for England is the first European Power which has appealed to the verdict of honourable men, instead of to blood and iron. And I wish you all many such defeats as we have had to-day, for that will teach us to be victorious. Raise your glasses, ladies and gentlemen, for the Red Cross, for in this sign we will certainly conquer.” (Strindberg 1915: 64–5).

<sup>16</sup> Schücking 1918: xi.

<sup>17</sup> Terminology is not uniform. Others speak of the 'international arbitration campaign' or 'movement' (see e.g. Mazower 2013: 83), but that risks ignoring the push for international adjudication and 'proper courts'.

<sup>18</sup> For much more on the 'legalist movement' see the highly accessible accounts by Mazower 2013: 81 et seq.; and Hollander 2013: chapter 1 ('A Prelude for Peace'); and further, Reid 2004: 527. The American approach – by far the most influential – was shaped by the work of Ladd 1840; it is covered in detail in Boyle 1999; M.E. O'Connell 2009: 30; and Janis 2004: 95 et seq.

barely a century earlier, had had to be rescued from near-obsolescence. Predictably, the emerging influential professional networks of international lawyers – the Institut de droit international and the International Law Association, both set up in 1873<sup>19</sup> – found the idea of orderly dispute resolution according to legal standards attractive and supported it. But beyond that, and much less predictably, from the late 19th century ‘international arbitration’ and, increasingly, ‘international adjudication’ became rallying cries for a wide range of heterogeneous pressure groups, among them pacifists, the Inter-Parliamentary Union, socialist movements, national leagues for the furtherance of peace, and religious associations including the Catholic Church.<sup>20</sup> These, and many more, formed a powerful legalist movement: no doubt a broad church, but firm in its faith in courts and tribunals as guardians of world peace and committed (more pragmatically) to increase their role in world affairs. This, to be sure, was but one of a number of progressive causes of the day; but around the turn of the last century, it was at the forefront of the internationalist struggle.<sup>21</sup>

In the two decades preceding the outbreak of the First World War, the legalist movement seemed to go from strength to strength. Its manifestos exuded growing confidence.<sup>22</sup> Its claims were espoused by universal peace congresses. And advocates of international courts and tribunals – such as Asser, Fried, Root, Cramer, the Institut de droit international, and Theodor Roosevelt – dominated the lists of Nobel Peace laureates.<sup>23</sup> By 1914, as noted by Mark Mazower, ‘the campaign for international arbitration’ was ‘probably the single most influential strand of internationalism’.<sup>24</sup> Alongside civil society groups, it included relevant political

<sup>19</sup> On both, and on the emergence of an international legal profession from the 19th century, see Koskeniemi 2002: 11 et seq.

<sup>20</sup> Janis (2004: 95) underlines the limited influence of trained (international) lawyers: given how much debate about today’s international courts has become ‘the erudite province of lawyers and judges’, he notes that ‘it is easy to suppose that it was a juridical impulse that was principally responsible for their creation. However, to a surprising extent, the international courts of today were the work of nineteenth-century American Utopians by and large untrained in law’.

<sup>21</sup> As Caron (2000) observes, ‘these [pacifist] movements could have chosen other strategies to promote peace’ (and in fact they would during most of the 20th century); because this is so, ‘[the internationalists’ focus on a permanent international court deserves attention’ (8). Reid (2004) agrees that the focus on courts and tribunals was ‘deliberate and methodical’ (543). The fact that the Inter-Parliamentary Union had initially been founded as an ‘Inter-Parliamentary Conference on International Arbitration’ reflects the prominence of international arbitration to the internationalist cause.

<sup>22</sup> ‘The feasibility of arbitration as a substitute for war is now demonstrated’ – this was the opening line of the 1895 Resolution adopted at the first Lake Mohonk Conference on International Arbitration. John Westlake’s treatise on *International Law* (vol. 1, 1896: 368) ended with the words: ‘[I]nternational arbitration is in the air. ... It is the season to raise our hopes, and do our utmost to try what the idea of international arbitration can accomplish’.

<sup>23</sup> See [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/](http://www.nobelprize.org/nobel_prizes/peace/laureates/) for details, short biographies, and acceptance speeches.

<sup>24</sup> Mazower 2013: 83; see also Reid 2004: 528: ‘On the global level, turn-of-the-century peace advocates were unique because of their composition and their political foresight. Current and former members of American, British, French, Japanese, Chinese, and Italian governments eventually participated in these gatherings of arbitrationists, as did military personnel, clergy, labor, teachers, bankers, and journalists’. Janis (2004: 145) notes that ‘by the turn of the

establishment figures (notably within the United States), and while it faced divisions between the more utopian and more pragmatic camps, agreement on core demands remained strong: more binding dispute resolution would minimize tensions between states; as a consequence, it was necessary to increase the reach of treaties requiring states to accept arbitration and adjudication, and ideally to move from *ad hoc* arrangements to standing international courts.

### *Disappointments and incremental progress*

Needless to say, the practical implementation of these proposals proved challenging. Yet, despite disappointments, vigorous lobbying by the legalist movement facilitated the consolidation and significant expansion of binding dispute settlement in the period up to 1914. The Hague Peace Conferences – convened by Tsar Nicolas as an inter-state congress,<sup>25</sup> but shaped, at least to some extent, by ‘world society action’ (Clark 2007: 71) – saw states discuss proposals for compulsory dispute settlement. In the end, as is well known, the Conferences did not endorse proposals requiring states to accept arbitration as obligatory, but they reflected the broad support for the principle.<sup>26</sup> The 1899 Hague Convention for the Pacific Settlement of Disputes set up a mechanism for the smooth organization of arbitral proceedings (which it misleadingly called the ‘Permanent Court of Arbitration’ (PCA)<sup>27</sup>) and, recognized that ‘[i]n questions of a legal nature ... arbitration is ... the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle’.<sup>28</sup> Eight years later, at the second Hague Conference, a clear majority of states were willing to accept compulsory arbitration in all disputes not involving questions of vital interests, and only after ‘titanic debate’ (Eyffinger 2007: 219) did a handful of states succeed in blocking the adoption of a provision to this effect (Tams 2007: 126–7).<sup>29</sup>

At the bilateral and regional level, like-minded states went further. While the time may not have been ripe for a universal arbitration treaty, states concluded dozens of bilateral arbitration treaties that permitted the unilateral recourse to arbitration in the event of a dispute.<sup>30</sup> The Permanent Court of Arbitration, misnamed though it may have been, allowed for arbitral proceedings to be initiated relatively smoothly; and its record of its activities at the beginning of the 20th

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century, British and US international law enthusiasts were exerting increasing influence over their governments’.

<sup>25</sup> Cf. the Russian Circular Note of December 1898, reproduced in Scott 1920: xv.

<sup>26</sup> On the conferences (and their impact on dispute settlement) see e.g. Baker 2009. For more on the first conference see Caron 2000; for details on the second see Eyffinger 2007: 197; and Tams 2007: 119.

<sup>27</sup> As has often been observed, the PCA was neither a ‘court’ nor ‘permanent’. To which one may add that since the 1930s, it has no longer ‘arbitrated’, but has administered arbitrations organized outside the Hague Convention.

<sup>28</sup> *Convention (I) on the Pacific Settlement of International Disputes* (1899), Article 20.

<sup>29</sup> Two other courts proposed at The Hague never saw the light of day: the Court of Arbitral Justice and the International Prize Court. For details see Tams 2007: 127–9.

<sup>30</sup> The United States entered into 22 such treaties during 1908 and 1909 (though with caveats for disputes involving vital interests); see Neff 2014: 329–30.

century reflects a growing willingness of states to submit to binding dispute resolution.<sup>31</sup> And where the Hague Peace Conference had been deadlocked over the establishment of permanent institutions, American states in 1907 set up the first proper international court, the Central American Court of Justice, competent to hear inter-state disputes as well as claims by private citizens.<sup>32</sup> An influential US *Handbook of International Law* published in 1910 gave expression to a widespread sentiment when noting that ‘in a single decade the advance made in centuries [had been] surpassed’ (Wilson 1910: v).<sup>33</sup> In the light of these developments, the inauguration of the Peace Palace in The Hague, on 28 August 1913, was perceived by many as another ‘coming of age’: built with American funds by European leaders, it reflected the consolidation of the arbitration movement and symbolized the power of the legalist movement.

### *Confidence undermined: sleepwalking into war*

Then came 28 June 1914, which exposed the hollowness of the structure. The July crisis in particular highlighted the limited practical impact of international arbitration treaties. Nations (including those who had come out in favour of compulsory dispute settlement) consciously shunned ‘the hushed calm of court rooms’ and instead opted for the ‘swirling world of political cut-and-thrust’ (cf. Neff 2014).<sup>34</sup> Over the following four years of bitter warfare, they would come to rely on attrition tactics, unrestricted submarine warfare, chemical weapons, and genocidal violence. Arbitration, which prior to 1914 had helped resolve low- and mid-level conflicts, proved powerless to stop a major global conflict from spiralling out of control.

This was not lost on statesmen and observers, and it led to an (under-appreciated<sup>35</sup>) re-assessment of the role of international courts and tribunals. When, driven by war fatigue and the growing awareness of the horrors of war, the leaders of the Allied and Associated Powers began to design the post-war world order, international courts and tribunals no longer took centre stage in their visions. True, the inter-war period saw the creation of the first ever world court, the Permanent Court of International Justice. But even the grand rhetoric commemorating its inauguration<sup>36</sup> could not mask the fact that this was to be a

<sup>31</sup> For a detailed survey see François 1955 : 479–522.

<sup>32</sup> See American Journal of International Law 1908 (vol. 2, suppl. 231 for the founding document, and further Riquelme Cortado 2013.

<sup>33</sup> For more on the pre-1914 sentiment see Hollander 2012: 7–13.

<sup>34</sup> As Matheson notes, ‘on the brink of the War in July 1914, the Tsar proposed to the Kaiser that the dispute between Austria and Serbia about the assassination of Archduke [Franz] Ferdinand be submitted for arbitration in The Hague, but Austria was unwilling’ (Matheson 2013: 19).

<sup>35</sup> The following draws on Wertheim 2012: 210. For much more on ‘legalist’ and ‘anti-legalist’ trends in the establishment of the post-WW1 order see Kennedy 1987: 841; condensed accounts can be found in Mazower 2013: 119–23; and Bernstorff 2010: 193–5).

<sup>36</sup> See e.g. Scott 1921: 55: ‘We should ... fall upon our knees and thank God that the hope of ages is in process of realization’. At the inaugural ceremony, the League of Nations Secretary General, Sir Eric Drummond, had even gone so far as to praise the Court’s establishment as

different court from the supreme tribunal envisaged by the legalists. Unlike in 1907, when proposals to make arbitration compulsory had enjoyed the support of Britain, France and the United States (to name but a few), this time the great powers ensured the world court would not possess automatic jurisdiction.<sup>37</sup> In practice, as will be explored in the next section, it was to be a court for low- and mid-level disputes (see *infra*: IV.1). And most importantly, the world court was designed to operate on the margins of the new world organization, the League of Nations: not part of the League's machinery for preserving peace and barely integrated in its (ill-fated) collective security system. The League's founders were idealist, too, but theirs was not the idealism of the legalists. Their idealism did not centre on arbitration or adjudication but on collective decision-making within international organizations: not the force of law but the strength of political action backed by public opinion were to ensure the League's success.<sup>38</sup> Elihu Root's assessment of the League Covenant reflected a sense of disappointment at the 'relegation' of legalist thought in new post-war order: 'Nothing has been done to provide for the reestablishment and strengthening of a system of arbitration or judicial decision ... We are left with a program which rests the hope of the whole world for future peace in a government of men, and not of laws, following the dictates of expediency, and not of right'.<sup>39</sup> And so, the post-war order brought about the long-sought establishment of a proper world court, but at the same time saw that court relegated to the margins of the newly established architecture of international security.<sup>40</sup> The idealist approach of the early 20th century was giving

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'the greatest and ... most important creative act of the League ... There have been various well-distinguished marks in the progress of mankind. The opening of the Court is not the least of these. Indeed, we believe and hope that it will prove the greatest. After all, the ideal to which I presume all men of goodwill look forward is that not only individual nations but the whole world shall be ruled by law' (PCIJ Reports 1922, Series D, No 2: 320).

<sup>37</sup> Rosenne notes that 'there was a strong drive in the preparatory phase to endow the Court with compulsory jurisdiction over legal disputes'; however '[t]he Great Powers especially were firmly opposed to this and the [League] Council rejected the idea: Sh. Rosenne, Permanent Court of International Justice, in Max Planck Encyclopedia of Public International Law ([www.mpepil.com](http://www.mpepil.com), para. 30). The case for compulsory jurisdiction is set out in detail in the dissenting opinion of Judge Cançado Trindade in the Case *concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation) (ICJ Reports 2011: 239, paras. 6–26).

<sup>38</sup> Mazower (2013: 121) speaks of 'Woodrow Wilson's impatience with the entire legalist paradigm'.

<sup>39</sup> Root to Henry Cabot Lodge, 19 June 1919, cited in Wertheim 2012: 228. See further Zasloff 2003: 239, and 348–9: 'Root's legalism, however, diverged sharply from Wilsonian diplomacy, a point obscured by frequent references to Wilson's "legalism". As Root noted, neither the Versailles Treaty nor the Fourteen Points called for international legal institutions (such as a world court) or compulsory arbitration of legal disputes; indeed, Wilson rejected the legal-political distinction that served as the essential framework of Root's thinking.'

<sup>40</sup> See von Bernstorff 2010: 195–6: 'The Covenant ... enshrined the primacy of politics over international law institutionally within the powerful organ of the Council ... [but] failed to institutionalize the encompassing and compulsory judicial controls of political decisions demanded by the [legalist] internationalists'. Giustini (1985: 213, 224) makes a similar point when noting that 'The League of Nations system which followed the War did little to live up to these [legalist] expectations. It focused on the political rather than judicial settlement of disputes'.

way to a much more pragmatic assessment of the role of international courts and tribunals in world affairs.

#### IV. Towards Pragmatism: International Courts and Tribunals on the Margins of World Politics

By the 1920s, the main aspects of the modern system for the settlement of inter-state disputes had been established. Arbitration had matured into a recognized form of dispute settlement. The international community had set up mechanisms for the administration of arbitral proceedings and, from 1922, possessed an operative, permanent world court that could respond quickly if so requested. A large number of bilateral and regional agreements permitted recourse to arbitration over particular types of disputes, while treaties concluded after World War 1 (beginning with the Paris peace agreements and the arrangements for minority protection) envisaged proceedings before the Permanent Court of International Justice. These were significant steps forward; and yet even by the 1920s, a more sober perspective on courts and tribunals was gaining ground. '[T]he profound and widespread nineteenth-century faith in the peacekeeping ability of an international court' (Caron 2000: 9) (still strongly felt during Hague Peace conference) was giving way to a pragmatic appreciation of the role of courts and tribunals: they were no doubt useful, but less came to be expected from them.

##### *A world court at last – but a modest one*

The move towards pragmatism was not brought about by a 'one-off', momentous decision; it was perhaps rather a 'slide' – a process in the course of which a world court was 'operative', but played a much more modest role than envisaged by legalists. This 'pragmatic period', it is argued, lasted for around five decades, from the 1920s to the 1970s, when the world court, in the view of contemporary observers, 'ha[d] fallen to perhaps its lowest position of international prestige (Falk (1971: 314–5)).

In the slide towards pragmatism, the experience of the newly established PCIJ was highly relevant. A world court had been established, but it hardly ever addressed disputes of world relevance. The move from arbitration to adjudication allowed for a more systematic evolution of international law, gradually moulded, as a by-product of litigation, in the jurisprudence of a permanent court.<sup>41</sup> However,

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<sup>41</sup> After little more than a decade of the PCIJ jurisprudence, Hersch Lauterpacht (1934) published a series of lectures, in monograph form, on *The Development of International Law by the Permanent Court of International Justice*. This marked the beginning of a never-ending stream of literature on the PCIJ's and ICJ's law-making potential. Writing in 2013, Ole Spiermann notes perceptively: 'Obscure cases decided by the Permanent Court are household names, familiar to present generations of international lawyers, because they were, by chance, the first place for authoritative expression of various principles of general international law. Such statements of principle have found wide use far beyond their original context. As such they have little to do with the actual life of the Permanent Court, except for



the disputes submitted to the new world court were, if anything, of lesser relevance than those submitted to arbitration before World War 1. This was not principally a problem of jurisdiction. Even in the absence of automatic, compulsory jurisdiction, during the 1920s and 1930s, states regularly agreed on compromissory clauses establishing the jurisdiction of the PCIJ over specific types of disputes.<sup>42</sup> Many states went one step further and accepted the Court's jurisdiction over *all* disputes under the so-called optional clause.<sup>43</sup> Still, the considerable potential for inter-state litigation was never realized.<sup>44</sup> States made sparing use of the Court, and for the bigger questions of the day they relied on other means of dispute settlement (or preferred not to settle). Over the two decades of its existence, the Court rendered a total of 32 judgments and 27 advisory opinions (i.e. less than three decisions per year). Its sphere of activity remained decidedly European: in only *four* cases did non-European states appear, and in only *one* single case did a non-European state (Brazil) play a decisive role.<sup>45</sup> Its decisions, while generally well received, concerned a fairly limited set of issues, among them disputes about maritime incidents, the treatment of aliens and notably minority issues. Through its competent handling of these, the Court established itself – and it largely eclipsed the Permanent Court of Arbitration as the most prominent framework of international arbitration. But the PCIJ could hardly be said to intervene in matters of peace and war. In the words of Spiermann, '[i]n the political history of the League of Nations, the Permanent Court [was] but a footnote, partly because it did not address the main political issues of the day' (Spiermann 2005: 132).

### *Alternative visions of international security*

If the world court – and international arbitration – played a limited role in questions of war and peace, then this was partly because other international actors had entered the stage. As is implicit in Spiermann's quote, the League of Nations was the new framework within which matters of peace and war were to be addressed. As the first world organization of general competence, the League

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confirming the ambition on the part of the Permanent Court to take an active role in the development of international law, at least in the 1920s (Spiermann 2013: 399).

<sup>42</sup> Surveying developments, Jenks (1964: 13) perceptively notes that '[f]rom the Geneva Arbitration Act of 1872 until 1930, there appeared to be a long-term trend towards the acceptance of a larger measure of compulsory jurisdiction'. The 1928 Act for the Pacific Settlement of International Disputes (League of Nations Treaty Series, vol. 93: 344) was the most ambitious attempt to expand the PCIJ's jurisdiction; it marked the last major attempt to introduce compulsory arbitration or adjudication through a universal dispute settlement treaty, yet limited ratification numbers and far-reaching reservations affected its relevance (see Caflisch 2012: 317–8). As Giustini (1985: 228) notes, '[n]o case was ever brought before the Permanent Court on the basis of the General Act'.

<sup>43</sup> Under the 'optional clause', agreed as a substitute for proper compulsory jurisdiction during the drafting of the PCIJ Statute, states could voluntarily declare their willingness to accept the Court's jurisdiction over all disputes; during the 1920s and 1930s, this was regularly done (albeit with reservations). See Tams (2013: 11, 19–21); and, for a fuller treatment, Lamm (2014: 12–32).

<sup>44</sup> See Tams (2013: 21–8) for further comment.

<sup>45</sup> Jenks (1964: 75–6) provides many details.

established a system of collective security, set up permanent institutions and gradually built networks for international co-operation.<sup>46</sup> In the design of the inter-War period, collective security and institutional mechanisms for conflict resolution (but no longer courts) were envisaged as the real alternatives to war, gradually coupled with normative prescriptions against military force. As is well known, that, too, was rather naïve. Agreed outside institutional structures, rules against war (such as those of the Kellogg-Briand Pact) had little traction.<sup>47</sup> The existing institutional structure – the League – was meant to be a world organization, but never achieved universality.<sup>48</sup> The Covenant's collective security system was not designed to cope with the challenges of the 1930s.<sup>49</sup> Throughout, the League depended on the support of its member states, which very often was not forthcoming.

But an exclusive focus on its failures risks overlooking how much the 'League experience' shaped the international community's approach to the prevention of war. After 1919, the maintenance of international peace and security had come to be seen as a project of collective security to be pursued within international organizations, with courts (unlike in the legalist project) limited to some form of associated role. And while concepts and strategies of collective security evolved over time, that basic division of roles – between an institutionalized 'peace machinery'<sup>50</sup> on the one hand, and courts and tribunals on the other – would never be reversed. At the universal level, during the 1940s, when designing the new organization for the post-WW2 order, the Allied Powers insisted that the Charter would recognize their primary responsibility for the maintenance of international peace and security.<sup>51</sup> Correcting another 'design failure' of the League, the Charter banned resort to military force comprehensively.<sup>52</sup> Of course, the UN also was to have its court (in fact, one more integrated into the organization<sup>53</sup>); however, any

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<sup>46</sup> For instructive summaries see Claude (1971a: 42 et seq.); Dinstein (2005: 80 et seq.); for a contemporary perspective cf. Brierly 1932: 308). The writer's own view is set out in Tams (2006: paras. 24–9).

<sup>47</sup> See League of Nations Treaty Series, vol. 94: 57 for the treaty text; and Dinstein 2005: 83–5 for comment.

<sup>48</sup> Tams 2006: (paras. 7–9).

<sup>49</sup> Tams 2006 paras. 30–1). In the words of Claude (1971a: 46), the League's collective security system (like 'the French Maginot line') was the product of a 'retrospective mentality'. Prescribing mandatory cooling-off periods and recourse to an international body, it might very well have prevented states from sleepwalking into another World War 1. But the challenges of the 1930s were not about sleepwalking into war. 'The League, established to prevent the accidental war, was unable to cope with Hitler's deliberately plotted campaign of conquest' (ibid: 46).

<sup>50</sup> The term is Jessup's: see Jessup 1960: 18).

<sup>51</sup> See Claude (1971a: 60 et seq.)

<sup>52</sup> According to Article 2 (4) of the Charter, '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' This is indeed, as Schrijver notes, the 'backbone of the Charter system of collective security' (Schrijver 2014: 465, 487).

<sup>53</sup> Notably, the ICJ was to be one of the UN's principal organs (UN Charter, Article 7); the UN organs were authorized to seek advisory opinions (Article 96); the ICJ Statute became an

attempt to 'upgrade' its role into that of a true supreme court stood no realistic chance of success.<sup>54</sup> The world court's 'second incarnation', the International Court of Justice, was closely modelled on the Permanent Court. Its link with the UN's peace and security machinery was tenuous;<sup>55</sup> and its jurisdiction remained optional: states could submit disputes for judicial settlement, including in questions of peace and security, but they did not have to.<sup>56</sup> All this confirms Claude's assessment: 'The United Nations has clearly contributed little to establishing the sanctity of the principle of judicial decision' (Claude 1971a: 234).<sup>57</sup>

### *The early years of the International Court of Justice*

Not surprisingly, during the first decades of its existence, the ICJ remained on the sidelines of world affairs, and had little involvement in questions of war and peace. The *Corfu Channel case* saw the Court pronounce on a British-Albanian maritime incident.<sup>58</sup> Otherwise, however – and notwithstanding the willingness of UN organs occasionally to use the ICJ as an 'in-house' lawyer rendering an opinion on aspects of United Nations law – from Korea to Indochina to Biafra, 'States remained reluctant to accept international adjudication of their conduct during wartime' (Matheson 2013: 31). In fact, if anything, its role declined. Whereas most League members had not in principle been opposed to the idea of binding dispute

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integral part of the Charter (Article 92); and compliance with judgments a Charter obligation, which the Security Council could help enforce (Article 94).

<sup>54</sup> In fact, the Inter-Allied Committee ('London Committee') had recommended to keep the Court out of the UN's political work (see American Journal of International Law 1945, vol. 39 suppl.1).

<sup>55</sup> While the Court is a principal organ of the UN, the Charter does not provide it with jurisdiction to entertain disputes. Under its Article 36, the Security Council can 'recommend appropriate procedures or methods of adjustment' and, in so doing, is meant to 'take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice'. Yet in the Court's first contentious case, seven ICJ judges clarified that Article 36 of the Charter did not form a self-standing basis of jurisdiction (see *Corfu Channel case*, Separate opinion of Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi Pasha, Krylov, ICJ Reports 1948: 32).

<sup>56</sup> For a survey of attempts, during the San Francisco Conference, to move towards compulsory jurisdiction see Cançado Trindade 2005: paras. 27–36). The UN's only subsequent attempt to sponsor a general dispute settlement treaty – the Revised General Act of 1949 – ended as a farce. As explored in section V.1., the trend has been (in the words of O'Connell and VanderZee) 'from general to specialized compulsory jurisdiction' (2014: 58).

<sup>57</sup> For a similar observation see Giustini 1985: 229: 'The Charter does not encourage international adjudication. Instead, it continues the focus on political settlement.' D.W. Greig goes further: 'The Charter is perhaps more of a discouragement than an incentive to judicial settlement. The dispute machinery of the Charter provides a new arena for diplomatic exchanges and the advancement of legal arguments without fear of a final determination upon their validity' (1976: 693).

<sup>58</sup> This, admittedly, was a dispute involving military questions; and in retrospect, one can perhaps view *Corfu Channel* as an early example of ICJ 'conflict litigation' (on which more below, in section V.1.). But by the 1970s, it could equally be seen an isolated incident – the exception that proved the rule. And of course, like subsequent instances of conflict litigation, *Corfu Channel* raised serious compliance problems; it took around 45 years for Albania to honour the award.

settlement, Communist states were.<sup>59</sup> Newly-independent states emerging since the late 1950s viewed the world court with indifference or suspicion; after the 1966 *South West Africa* judgment, in which the Court on dubious grounds refused to entertain Ethiopia's and Liberia's legal challenge of South Africa's imposition of apartheid policies, many became openly hostile.<sup>60</sup>

Assessments of the ICJ's record during the first 25–30 years of its existence reflect a growing sense of pessimism, if not despair: Inis L. Claude criticized the 'Politics of neglect' (1971b: 344), which led states to withhold cases from the Court; an influential study published in 1976 bore the title 'The International Court of Justice: An Analysis of a Failure' (King Gamble and Fischer 1976). Not everyone agreed with that overall verdict, yet even benevolent observers recognized that in relation to the questions of peace and security, the ICJ was not a relevant factor: 'At present the Court has very little to do with the enforcement of peace', states Lissitzyn (1951: 103) in an influential study prepared for the Carnegie Endowment. (In fact, during the mid-1970s, the Court had nothing to do at all, as states had stopped referring disputes to it.) In Max Sørensen's assessment, the Court's role in world affairs was 'relatively insignificant' (Sørensen 1960: 261, 272); while Hersch Lauterpacht (perhaps the 20th century's most influential advocate of international courts) thought it 'an exaggeration to assert that the Court has proved to be a significant instrument for maintaining international peace' (1958: 4). And according to a detailed German study published in the 1970s, the idea of 'arbitration instead of war' had gone 'completely belly-up' (von Mangoldt 1974: 83).

These verdicts by contemporaries are perhaps too damning. With the benefit of hindsight, when looking at international arbitration and adjudication from a slightly broader perspective, one can make out signs of a reorientation. Though not 'enforcing peace' (or stopping wars), courts and tribunals even in the 'pragmatic phase' were mandated to address discrete legal issues relating to military conflicts. Two of these discrete functions deserve to be mentioned, as they were to provide blueprints for subsequent, more ambitious, initiatives. First, drawing on 19th century practice, arbitral tribunals were set up to hear claims by individuals for war-time losses (see Matheson 2013: 19–21; Neff 2014: 357–8). In the aftermath of World War 1, this method was prevalent in dealing with a particular set of consequences of the war; but after 1945, the practice seemed to fall out of favour: questions of reparation were largely dealt with through treaty arrangements (Matheson 2013: 24–5). Second, the international community had begun to rely on

<sup>59</sup> See Giustini 1985: 243: 'In general, the influence of the Soviet bloc has been strongly against the extension of the judicial function in international relations'.

<sup>60</sup> In 1960, Ethiopia and Liberia, the only two African states that had been members of the League of Nations, instituted ICJ proceedings, alleging that South Africa had not fulfilled its duties under the South West Africa mandate granted to it by the League of Nations. After having initially upheld jurisdiction, the ICJ in 1966 dismissed the case, holding – with the narrowest of margins – that Ethiopia and Liberia had no standing to enforce the mandate provisions (see ICJ Reports 1966: 6). As Falk (1971) explains, the 1966 decision ran counter to the general view within the United Nations that South Africa was internationally accountable for its conduct in South West Africa: 'For the ICJ to cast a shadow across this consensus, after so many years of pleadings and arguments, was to outrage the diplomats of black Africa, to disappoint almost every government in the world, and to give international adjudication an image, at once, hopelessly reactionary and cumbersome' (Falk 1971: 318).

courts as instruments of international criminal justice. After cautious initiatives after World War 1, the tribunals of Nuremberg and Tokyo marked the first concerted attempts to hold individuals criminally accountable for their conduct during wartime.<sup>61</sup> This was a much more visible (and much more controversial) form of adjudication about military conflicts, which served a range of functions, from punishment to the recording of history. By the 1960s and 1970s, attempts to consolidate the post-WW2 *acquis* of international criminal justice<sup>62</sup> had clearly lost momentum; still, the examples of Nuremberg and Tokyo suggested that courts could perhaps adapt to perform new roles relating to war and peace.

### *New crises, old medicines: Hans Kelsen's Peace through Law*

However, outside these discrete functions, relatively little remained of the ambitious legalist plans for world peace. The movement itself faded away relatively quickly.<sup>63</sup> Arbitration and adjudication remained relevant topics to international lawyers, but after the 1920s quickly ceased to be matters of general interest. Internationalist sentiment did not disappear, but embraced other causes, from the League in the 1920s (when national 'League associations' attracted large numbers of members<sup>64</sup>) to nuclear disarmament, self-determination and perhaps human rights after 1945. Ironically, the limited appeal of the legalist movement during the pragmatic era can be seen from the response to one of its most ambitious proposals, viz. Hans Kelsen's *Peace Through Law* project (Kelsen 1944).<sup>65</sup> Published in 1944, at the height of debates about the post-WW2 order, this was a new attempt to prescribe an old medicine:<sup>66</sup> Kelsen proposed founding a new world organization built around a 'proper' world court, which would have jurisdiction over disputes relating to war and peace. To him, the decision to establish the world court on the margins of the League's 'peace machinery' (Jessup 1960)<sup>67</sup> was a fundamental mistake; like earlier generations of legalists, Kelsen felt that progress

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<sup>61</sup> Neff (2014: 397-400) provides an instructive summary; Robert Cryer traces the impact of the trials of Leipzig, Nuremberg and Tokyo (2005: 31-48). For many details on the German position see Kress 2006: 15.

<sup>62</sup> See notably UN General Assembly Resolution 95 (I) (1946); International Law Commission, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission 1950, vol. II: 374.

<sup>63</sup> In Mazower's words, the legalist 'movement[']s ... success in the years before [World War 1] was matched only by the marginalization that greeted it in the decades after it' (2013: 83-4).

<sup>64</sup> To give just one example, membership in the British League of Nations Union stood at circa 400,000 in 1931; in the words of a recent study, 'the League inspired a rich and participatory culture of political protest, popular education and civic ritual, which took root in British society between the wars' (McCarthy 2011: x).

<sup>65</sup> For a clear analysis see von Bernstorff 2010: 193 et seq.

<sup>66</sup> As Jochen von Bernstorff (2010: 193) notes, Kelsen was essentially 'reviving the Hague Movement's strategy of juridifying international relations through obligatory arbitration'.

<sup>67</sup> In the words of Kelsen: 'One of the most important, if not the decisive, causes [for the League's failure] is a fatal fault of its construction, the fact that the authors of the Covenant placed at the center of this international organization not the Permanent Court of International Justice, but a kind of international administration, the Council of the League of Nations' (1942: 151-2).

towards the 'pacification of the world' had to be brought about by courts and tribunals with compulsory jurisdiction.<sup>68</sup> But what had seemed prophetic a few decades earlier now failed to resonate: academic response among international lawyers was at best lukewarm;<sup>69</sup> and at San Francisco, the drafters of the Charter much preferred other methods of pacifying international relations. To them, as to one of Kelsen's reviewers, it simply seemed 'an illusion to believe that it ever will be possible to transform world history into nothing but a court procedure' (Kunz 1944: 673, 678). As a consequence, 'progress on the way to the pacification of the world' (cf. Kelsen 1942: 152) (which according to Kelsen required compulsory adjudication) could be sought through a range of different methods.

## V. Revitalization and Reorientation: the New Popularity of International Courts and Tribunals

Even if Kelsen's desire for a general world court of compulsory jurisdiction in order to achieve the 'pacification of the world' remains unsatisfied it is clear that some seventy years after the San Francisco Conference international courts are pursuing new, and different, horizons. As noted in the introduction, dozens of new courts and tribunals have been established and risen in prominence and relevance; they occupy 'new terrains'<sup>70</sup> well beyond the expectations that would have seemed 'realistic' (cf. Falk 1971) to observers writing in the 1960s or 1970s. WTO dispute settlement organs assess the legality of the EU's anti-GMO policies; the European Court of Human Rights scrutinizes British conduct during the occupation of Iraq; an ICSID tribunal hears arguments on Germany's nuclear phase-out; while the Philippines pursues arbitral proceedings against China over maritime rights in the South China Sea. If numbers, and public interest, are relevant indicators, this indeed seems to be an 'age of adjudication'.<sup>71</sup> Yet from even the most eclectic of listings, it is clear that adjudication has not just been revitalized, but also adapted to meet new goals. The subsequent section traces the parallel trends of revitalization and reorientation, but also highlights how, in crucial respects, things have not really changed that much.

The most obvious development in dispute resolution over the past half-century is the 'enormous growth of fora' (Romano 2008: 435) involved in binding dispute resolution. The growth had begun towards the end of the 'pragmatic phase', and it has picked up speed since 1989: at that point, there were six standing judicial bodies; to which nearly twenty courts and arbitral frameworks have been added

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<sup>68</sup> Kelsen was emphatic on this point: 'As long as it is not possible to remove from the interested states the prerogative to answer this question [whether international law has been violated] and transfer it once and for all to an impartial authority, namely, an international court, any further progress on the way to the pacification of the world is absolutely excluded' (1944: 13–14).

<sup>69</sup> For a survey see von Schmädel 2011: 71. For a much more positive assessment of Kelsen's approach (and impact) see O'Connell and VanderZee 2014: 56–8).

<sup>70</sup> Cf. the title of Karen Alter's influential study of 2014 (Alter 2014b).

<sup>71</sup> Cf. Christopher Greenwood, at [http://legal.un.org/avl/ls/Greenwood\\_CT.html](http://legal.un.org/avl/ls/Greenwood_CT.html).

since. As developments have been analysed elsewhere in detail,<sup>72</sup> it may be convenient to focus on the main trends, which for reasons of convenience can be summarized under three headings:

### *The establishment of specialized courts and tribunals*

The first trend has been one of functional specialization. Whereas debates during the first half of the 20th century focused on courts with potentially unlimited, general jurisdiction, the new courts tend to be specialized. Whereas the PCIJ and ICJ, just like arbitral tribunals established under the Hague system, could potentially address disputes covering international law in its entirety, more recent courts and tribunals have been established as guardians of particular treaty regimes (Shany 2009: 80). This has made the landscape of international dispute settlement more diverse; systems of international adjudication and arbitration today are tailor-made to meet the demands of specialized sub-systems. It has also resulted in a very uneven degree of 'judicialization'. The 'growth of fora' (Romano 2008: 435) is 'sector-specific' and has mainly concerned three distinct fields: human rights law, international economic law, and international criminal law. As in all moves towards specialization, courts and tribunals established in these fields come with the promise of increased expertise, which needs to be balanced against the risks of silo thinking.

### *The move towards regionalism*

Similarly, there has been a move from global towards regional dispute settlement bodies (Alter 2014a: 65). With the exception of the Central American Court (Supra, III.1.), the early courts were set up as universal institutions (even though the practical impact of this may have been limited in a global legal order dominated by European states). Since 1945, the move towards a truly universal legal order has been matched (and to some extent balanced) by a return to regional law-making, which has also led to the establishment of regional courts. As with specialization, this has permitted groups of states to advance where universal solutions lacked general support; at the same time, it has accentuated differences between more and less judicialized areas of international law: in terms of numbers, Europe clearly leads the move towards courts and tribunals, with Africa and the Americas following, and Asia lagging behind.<sup>73</sup>

### *The rise of non-state actors*

Finally, within the more diversified landscape of international dispute settlement, non-state actors have risen to prominence (Romano 2008: 437–8). Until 1945, permanent institutions for international adjudication and arbitration were typically

<sup>72</sup> The following notably draws on Alter 2014b; Alter 2014a: 63; Romano 2008; Kingsbury 2012; and Shany 2009: 73.

<sup>73</sup> C.P.R. Romano speaks of 'uneven geographical distribution' (2014: 90–1).

reserved to states.<sup>74</sup> Since then, and increasingly, binding dispute resolution has opened up and become more inclusive. Individuals are the natural claimants before human rights courts. Investment arbitration is driven by corporations. And since Nuremburg, the fact that '[c]rimes against international law are committed by men, not by abstract entities'<sup>75</sup> has been an article of faith for proponents of international criminal justice, which is justice imposed on individuals.

### *A paradigm change?*

These developments have clearly strengthened the role of international courts and tribunals in international relations, to the point where commentators speak of a 'paradigm change' (Alter 2014b: 3) or (more ambivalently) of a 'new tribunalism' (Skouteris 2006: 307). This shift ostensibly concerns the relevance of international adjudication and arbitration, which according to most intuitive parameters – numbers of decision, their impact on state governance, newspaper coverage, and academic interest – has greatly increased. Beyond that, it also affects the roles played by them. International courts and tribunals still tend to become active once a dispute has been submitted to them. However, their impact on international relations seems to have shifted. In the words of Yuval Shany, 'despite their frequent engagement in dispute settlement activities, the new courts are no longer primarily dispute-settling bodies ... They appear to have assumed two other primary functions instead: norm-advancement and regime maintenance', which may involve 'promoting a set of values such as human rights, or an end to impunity for international criminals', but also 'strengthening the rule of law in some areas of international relations which have undergone, or are undergoing, a process of legalization' (Shany 2009: 81–3). In the process, courts to some degree have lost their innocence and become highly controversial – witness current European debates about investment arbitration and the African Union's concerns about the ICC as a political tool of Western states. At the same time, they have assumed fairly mundane functions such as controlling the interpretation and application of international rules within areas of regional economic integration.

Given all these fundamental changes, it is worth noting that in the particular area under review in the present contribution, developments have been less dramatic. While the international community today 'deploys' courts and tribunals to perform a wide array of governance functions, the prevention of military conflict is usually not one of them.<sup>76</sup> Put differently, the revitalization of international courts and tribunals is not a return to the 'idealistic approach' of old that had viewed arbitration and adjudication as alternatives to war. Even in the 'era of adjudication',

<sup>74</sup> While the inter-state paradigm dominated, there were exceptions: the Central American Court of Justice was open to individuals, as would have been the International Prize Court. And claims commissions and tribunals were mixed from the beginning.

<sup>75</sup> International Military Tribunal, Judgment and Sentences, in *American Journal of International Law* 41 (1947: 223).

<sup>76</sup> As Kingsbury notes, '[t]he issues being adjudicated ... are largely those of a global legal order dominated by liberal interests' (Kingsbury 2012: 211). To illustrate, trade law issues can today be litigated, foreign intervention in civil wars only exceptionally; investors frequently have access to international tribunals, refugees tend not to.



courts and tribunals typically deal with discrete aspects of military conflicts: more often than before, no doubt, but not systematically or at the forefront of international endeavours at conflict resolution.

### *The increasing relevance of international courts*

The pursuit of international criminal justice is the most visible of these discrete aspects. Since the 1990s, the international community has built on the Nuremberg and Tokyo precedents and established a network of international and hybrid criminal tribunals competent to hold individuals accountable for atrocities usually committed during military conflict.<sup>77</sup> What has equally been revived is the tradition of claims procedures set up in the aftermath of conflicts and crises.<sup>78</sup>

In addition to these established contributions, international courts and tribunals today address aspects of military conflicts from two novel angles. The first has to do with the rise of human rights law. Over the past decades, regional courts have begun to apply human rights to conflict situations, and to hold states to account over their conduct.<sup>79</sup> In so doing, they have overcome archaic divisions between the legal regimes for peace and wartime. Yet the practical challenge of identifying the precise reach of individual rights guarantees in crisis situations remains enormous (See Lubell 2005: 737).

The second new trend is perhaps more remarkable. Since the 1980s, states have gradually become aware of the potential of submitting aspects of military conflicts to international courts and tribunals. States as diverse as Nicaragua, Bosnia, the Federal Republic of Yugoslavia, the Democratic Republic of the Congo, and Georgia have sought judicial decisions against states involved, directly or indirectly, in military conflicts with them.<sup>80</sup> Such forms of 'conflict litigation' face enormous obstacles. Due to jurisdictional limits, international courts are hardly ever capable of addressing a conflict in its entirety;<sup>81</sup> typically they can only deal with a side-aspect of it (or eventually conclude that they lack jurisdiction).<sup>82</sup> What is more,

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<sup>77</sup> Alter (2014a: 66–7) lists three properly international criminal tribunals (ICTY, ICTR, ICC) and a range of hybrid equivalents. Romano (2008: 438–40) provides an instructive summary. It is worth noting that the jurisdiction of international criminal courts does not necessarily depend on whether crimes have been committed during armed conflict; but in practice, some nexus will typically exist.

<sup>78</sup> See Matheson 2013: 87–90 (with brief comment on the two most prominent examples, the UN Compensation Commission established after the 1991 Gulf War and the Eritrea-Ethiopia Claims Commission).

<sup>79</sup> See Oberleitner (2015) for a comprehensive account.

<sup>80</sup> The clearest survey – covering both contentious cases and advisory opinions requested on aspects of military conflicts (notably the Israeli wall/security fence) – can be found in Matheson 2013: 33–62; also instructive is Crook 2014: 330.

<sup>81</sup> To illustrate, in addressing the claims by Bosnia and Croatia against the Federal Republic of Yugoslavia, the ICJ could only pronounce on questions of genocide (see Matheson 2013: 42–4).

<sup>82</sup> This e.g. happened in the cases brought by Georgia against Russia (relating to the July war of 2008), by the Federal Republic of Yugoslavia against ten NATO member states (during the Kosovo campaign of 1999), and the Democratic Republic of the Congo against Rwanda

proceedings can last for years and test the faith of states in courts.<sup>83</sup> Because of these obstacles, international litigation is typically pursued alongside other methods of conflict resolution. Unlike in the legalist vision of a century ago, it is not an alternative to war, but one of many strategies employed by the claimant to minimize the negative consequences of conflicts.<sup>84</sup>

### *Where do we stand? The status quo*

The combined effect of these trends is that international courts and tribunals today engage with aspects of military conflicts almost on a regular basis.<sup>85</sup> Yet they (continue to) do so from very particular angles: they have become fora for (often retrospective) debates about matters of war and peace, tools for mobilizing public opinion and recorders of history; they impose sanctions, enforce individual claims and occasionally rule on the legality of forcible state conduct. The prevention of wars is still largely outside their remit: the judicial role in crisis management remains 'an auxiliary or supporting role' (Rosenne 2002: 195, 217).

Judging from public debates, this is unlikely to change any time soon. Just as international courts have become specialized, so has the debate about them. Courts are appreciated and evaluated as integral parts of sectoral regimes. And whilst it is certainly the case that controversies surround the particularities of world trade panels, human rights courts, or investment tribunals, there is no attempt to return to the times of general courts: the debate has moved 'from general to specific compulsory jurisdiction' (O'Connell and VanderZee 2014: 58). As regards military conflicts, international criminal justice has become the favoured project of contemporary internationalists; this seems today's equivalent to the late 19th century's fascination with inter-state arbitration, or the post-WW2 focus on

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(concerning the respondent's involvement in the second Congo war) (see Matheson (2013: 44–5, 50–3 and 58–9).

<sup>83</sup> For example, when warned about Nicaragua's institution of proceedings, the United States first amended and then revoked its optional clause declaration; while this did not prevent the ICJ from pronouncing on Nicaragua's claims, the United States has since remained a more cautious ICJ participant; it also withdrew from the *Nicaragua* proceedings and refused to honour the ICJ's damages award. When the Federal Republic of Yugoslavia sued ten NATO member states during the 1999 Kosovo campaign, and amongst other claims relied on the Genocide Convention, this was decried as an abuse of process. By the same token, Israel (and a number of other states) were highly critical of the decision to request an ICJ advisory opinion on legal issues relating to the Israeli wall/security fence. For much more on these and similar challenges see Crook 2014; and Gray 2003: 867.

<sup>84</sup> Gray (2013: 904) succinctly summarizes the divergent perceptions on conflict litigation: 'The large increase in the number of cases on the use of force taken to the ICJ in recent years can be interpreted in a variety of ways. Taken most favourably, it shows the willingness of states to use the Court to reaffirm their conviction in the legality of their position in a conflict against a stronger opponent. Seen less favourably, such cases are an unhelpful move in a propaganda war where settlement is already being pursued through other means; weak cases may be brought as a means of distracting, delaying or inconveniencing an opponent'.

<sup>85</sup> As Matheson (2013: 61) notes, '[t]he involvement of international civil tribunals in situations of armed conflict over the past two decades stands in sharp contrast with what came before'.

disarmament. Calls to vest the world court with general compulsory jurisdiction over inter-state disputes can still be heard with some frequency,<sup>86</sup> but they lack the determination (or stubbornness?) of Kelsen's *Peace Through Law* and the passion of the legalists' appeal. Writing in 1996, the former ICJ President Sir Robert Jennings – by no means a cynic – offered the following cautious assessment: 'International lawyers have been calling, but calling in vain, for general compulsory jurisdiction for an international court since at least 1899 at the First Hague Peace Conference. It now seems as far off as ever. Surely the time has come to look harder for the reasons why governments do not feel able to respond to the call' (Jennings 1997: 1, 56).

## VI. Concluding Thoughts

It is beyond doubt that international adjudication occupies an established place in world affairs. Important areas of international relations have been effectively judicialized, in ways and degrees that the legalist movement of the pre-WW1 era could hardly have predicted. Yet in rising to prominence and relevance, international adjudication has largely been decoupled from war prevention, its original purpose. Its contributions to peace are manifold, but indirect. 200 years after Bentham's *Plan for a Universal and Perpetual Peace*, few would accept that if only a court were established, 'the necessity of war no longer follows from differences of opinion' (Bentham 1843: 552). International courts do not – and are no longer expected to – provide 'heroic and life-saving emergency treatment'; instead they have become 'providers of preventive health care and quality-of-life treatment' (Shany 2009: 80). As part of their more diverse mandates, international courts and tribunals do engage with aspects of military conflicts, but they do not exist today to prevent wars.

This can be decried as a lack of ambition and vision, or even as a betrayal of ancient ideals.<sup>87</sup> But perhaps the better view is to understand the evolving roles of international courts and tribunals as part of a more profound change in the history of 20th century international relations, namely the move towards more comprehensive international organization. As has been shown, the advent of the League, and certainly that of the UN, has fundamentally affected the role of courts

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<sup>86</sup> For recent proposals see e.g. Steiger (1996: 817); and Cançado Trindade (2005: 515). Within the United Nations, proposals tend to focus on the optional clause, which states are regularly encouraged to accept: see e.g. Boutros-Ghali (1992), *An Agenda for Peace*, UN Doc. A/47/277 para. 38; K. Annan (2006), Statement at the Sixtieth Anniversary Celebration of the International Court of Justice, UN Doc No. SG/SM/10414. But beyond the encouragement, no real pressure is exerted; and new declarations inevitably come with significant reservations.

<sup>87</sup> In this direction: Cançado Trindade (2011: para. 83), citing his concurring opinion in the case of *Hilaire v. Trinidad and Tobago* before the Inter-American Court of Human Rights: "If we are really prepared to extract the lessons of the evolution of international law in a turbulent world throughout the twentieth century, (...) we cannot abide by an international practice which has been subservient to state voluntarism [and] which has betrayed the spirit and purpose of the optional clause of compulsory jurisdiction".

in 'peace through law' designs: alongside the comprehensive world organizations mandated to preserve peace and security, they no longer seemed natural dispute settlers. Adapting Stephen Neff's statement quoted at the beginning of this contribution,<sup>88</sup> while preferable to the 'political cut and thrust' of old, dispute settlement in the 'hushed calm of courtrooms' does not necessarily appear superior to collective decision-making by organs of the organized international community. From 1919 onwards, arbitration and adjudication have no longer been the most obvious, let alone the only alternatives to war: and so, they have come to occupy niches in a broader scheme that primarily sought to attain *world peace through world organization* – a 'noble forward stride' of a different kind. This – rather than a betrayal of ideas – may explain the gradual move away from legalist visions over the course of the 20th century.

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<sup>88</sup> 'If all disputes could be resolved in the hushed calm of courtrooms rather than the swirling world of political cut-and-thrust, then civilization could be said to have taken a giant and noble forward stride' (Neff 2014: 346).

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